United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF OF APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1942

59

No. 8413

WILLIE ROSS, *Appellant*,

v.

JAMES O. HARTMAN, *Appellee*.

Appeal from the District Court of the United States for the District of Columbia.

EDMUND L. JONES,
HOWARD BOYD,
Attorneys for Appellee,
810 Colorado Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Statement of Case 1

Summary of Argument 2

Argument 2

Conclusion 6

CITATIONS

Squires v. *Brooks*, 44 App. D. C. 320..... 3, 4, 5

Slater v. *T. C. Baker Company*, 261 Mass. 424, 158 N. E. 778 4

Castay v. *Katz & Besthoff*, —— La. ——, 148 So. 77.. 4

Curry v. *Stevenson*, 58 App. D. C. 162, 26 F. (2d) 534.. 6

Peabody v. *Marlboro Implement Company*, 63 App. D. C. 288, 72 F. (2d) 81 6

Simmons v. *Brooks*, 63 App. D. C. 293, 72 F. (2d) 86.. 6

Forrester v. *Jerman*, 67 App. D. C. 167, 90 F. (2d) 552 6

Automobile Financial Responsibility Act, Title 40, Sec. 401 et seq. D. C. Code, 1940 Ed. 5

Rosenberg v. *Murray*, 73 App. D. C. 67, 116 F. (2d) 552 6

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1942

No. 8413

WILLIE ROSS, *Appellant,*

v.

JAMES O. HARTMAN, *Appellee.*

Appeal from the District Court of the United States for the District of Columbia.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

The evidence in this case was presented to the Trial Court through a stipulation of facts. It was conceded that only one question of law was involved—whether the action of the defendant's servant was negligence proximately causing plaintiff's injuries. After consideration of the stipulation,

the Trial Court, upon authority of a prior decision of this Court on all fours with the instant case, directed a verdict for the defendant. The appeal is taken from that action.

In short the stipulation stated that the defendant's servant drove the defendant's motor vehicle to the entrance of a garage, and left it in an alley where the garage attendant could place it inside for night storage. The ignition was left unlocked and the key in the ignition switch awaiting the removal of the truck inside the garage by the garage attendant. This was in breach of a traffic regulation which required motor vehicles to be kept locked. While so parked in the alley, some person, unknown to either of the parties, drove the truck away and an hour and forty-five minutes later, while being driven carelessly by this unknown person, without the permission or knowledge of the defendant and not on the defendant's business, the truck collided with the plaintiff to his injury.

SUMMARY OF ARGUMENT.

1. The act of defendant's servant in leaving the key in the ignition switch was not the proximate cause of the recklessness with which the thief thereafter drove the truck causing it to collide with the plaintiff.

2. Although the decisions of this Court clearly show that in the absence of the Automobile Financial Responsibility Act, which is not applicable to the facts in this case, the defendant would not have been liable if he had *permitted* the unknown person to use the truck, the plaintiff argues that defendant is liable where the use of the truck was *without the permission* of the defendant.

ARGUMENT.

I.

The stipulation in this case shows that the defendant's truck was left in the alley by the entrance to a garage, so that it could be taken inside by the garage attendant for

customary night storage. The key was left in the ignition switch admittedly in breach of a traffic regulation. This was about nine p. m. An hour and three-quarters later, while being operated by a thief, the truck collided with the plaintiff to his injury.

It was stipulated in the Trial Court that the sole question as to liability was whether the act of the defendant's servant in leaving the key in the ignition switch was the proximate cause of the accident. This Court decided that very question in *Squires* v. *Brooks*, 44 App. D. C. 320. By a unanimous decision it was there held that although the defendant may have been negligent in violating the police regulation, such act could only be a remote cause of what occurred thereafter, and that between such act and the plaintiff's injury, there was an intervening agency for which the defendant was not responsible; that this intervening agency was the proximate cause of the accident.

In that case, as here, the defendant's agent left an automobile standing on a street in this city, unattended and without locking it as required by an applicable Police Regulation. It was stolen and while operated by the thief at a reckless rate of speed, it struck and injured the plaintiff. These facts were alleged in the declaration of a suit against the defendant. A demurrer to the declaration was sustained in the lower Court. This was affirmed on appeal, this Court saying:

> "The demurrer was properly sustained, since the declaration clearly failed to state a cause of action against defendant. The act of defendant's agent in leaving the automobile on the street unlocked and unattended, in violation of the Police Regulations, was not the proximate cause of the accident. Defendant had no privity with the person who appropriated to his own use his automobile, and, while so unlawfully using the vehicle, inflicted the alleged injury. Between plaintiff and defendant an agency intervened, for which defendant was not responsible, and to which the accident is directly attributable. It is charged that the accident would not have occurred had defendant's agent

> not left the automobile unlocked on the street. Neither would it have occurred had not the unknown person unlawfully appropriated the automobile to his own use. The first unlawful act was only a remote cause of the accident, while the second unlawful act was the proximate cause. However negligent defendant may have been in violating the Police Regulations, he was in no way a party to the alleged reckless and unlawful acts which caused the accident."

This doctrine concerning the effect of an intervening agency is too fundamental to support with extensive citations. Its application to the situation presented by the instant case has been recognized and applied by this Court. There appears to be no reason why the question should be reexamined.

Two other cases in all respects similar to *Squires* v. *Brooks*, have been found, both of which reach the same result. Our research has disclosed no case to the contrary, and since plaintiff has cited none, we assume that none exists.

In *Slater* v. *T. C. Baker Company*, 261 Mass. 424, 158 N. E. 778, the defendant's employee left a delivery truck committed to his care on the public street unlocked with the key in the switch. This was in violation of Section 7 of G. L. C. 90 of Massachusetts, which required cars to be locked "to prevent such vehicles from being set in motion by unauthorized persons." The truck remained in this condition for three and one-half hours when it was stolen and driven recklessly and at a high rate of speed for a mile and a half, where it collided with the plaintiff. It was held that a jury could have found that if locked the auto could not have been stolen, but this, it was said, was not the proximate cause, because "the larceny of the automobile and its use by the thief were intervening independent acts which the defendant was not bound to anticipate and to guard against."

To like effect is *Castay* v. *Katz & Besthoff*, .. La. .., 148 So. 77. In that case a truck belonging to the defendant was left on a public street in New Orleans with the engine run-

ning and unattended. This occurred on Mardi Gras Day when great numbers of people were in the street and "evilly disposed persons abroad." The truck was stolen and while in possession of the thief was caused to collide with the plaintiff five blocks from where defendant's agent had left it. The Court said that assuming for the purposes of argument, that it was negligence to leave the truck unattended and unlocked, this act would not be the proximate cause of the plaintiff's injury. "The theft of defendant's motor truck and the alleged injury of the plaintiff by the thief was," the Court said, "a consequence too remote to have been reasonably within the contemplation of defendant's driver when leaving the parked truck with the motor running, and the intervening act of the thief was sufficient to break the sequence of defendant's negligence so as to establish the intervening cause as the efficient one proximately causing the accident."

Squires v. *Brooks* was cited as authority for that holding.

II.

The Automobile Financial Responsibility Act, Title 40, Section 401, et seq. D. C. Code 1940 Edition, which was adopted in 1935, provides, among other things, that where a motor vehicle is operated upon the public highway "with the consent of the owner, express or implied, the operator thereof shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle." It is stipulated in the intsant case that the truck was driven without the consent, permission or knowledge of the defendant, and that it was not on his business. Consequently the provision of the Code just mentioned, creating a conclusive presumption of agency, has no application to the question now under inquiry. Therefore cases of this Court decided prior to the Automobile Financial Responsibility Act and cases in which that Act has no application, may be examined to obtain governing principles of law.

It has been held by this Court in a number of such decisions that where an automobile is used with the permission of the defendant, but not on his business, no liability can be imposed upon the owner for the negligence of the operator. Notably among these cases are: *Curry* v. *Stevenson*, 58 App. D. C. 162, 26 F. (2d) 534; *Peabody* v. *Marlboro Implement Co.*, 63 App. D. C. 288, 72 F. (2d) 81; *Simmons* v. *Brooks*, 63 App. D. C. 293, 72 F. (2d) 86; *Forrester* v. *Jerman*, 67 App. D. C. 167, 90 F. (2d) 412. In fact, it has been held by this Court subsequent to the adoption of the Automobile Financial Responsibility Act that a similar result is to be had in a situation where, as here, the Act has no application because the automobile was driven without the permission of the owner. *Rosenberg* v. *Murray*, 73 App. D. C. 67, 116 F. (2d) 552. It will therefore be observed, the Automobile Financial Responsibility Act being inapplicable, that the appellant is urging a contention which, if accepted, would produce this result: If the unknown person who drove the defendant's truck had come to the defendant and asked and secured permission to drive it, the defendant would *not* be liable to the plaintiff; but where the unknown person took the truck without the knowledge or permission of the defendant, and thus further isolated the defendant from the plaintiff's injuries, the defendant *would* be liable therefor. This would be an anomalous result indeed.

CONCLUSION.

It is clear therefore that the action of the trial Court was proper and the judgment should be affirmed.

Respectfully submitted,

EDMUND L. JONES,
HOWARD BOYD,
Attorneys for Appellee,
810 Colorado Building,
Washington, D. C.